

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

Original

76-7628

To be argued by
RENEE MODRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARMEN IRIZARRY,

Plaintiff-Respondent,

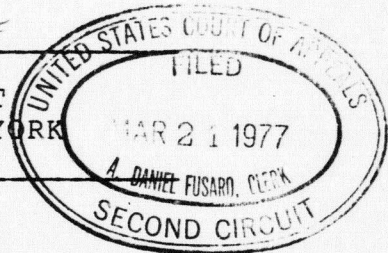
-against-

IRVING ANKER, individually and as Chancellor of
THE BOARD OF EDUCATION, JULIUS R. RUBIN, Individually
and as Chairman of the BOARD OF EXAMINERS and THE
BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellants.

APPELLANTS' BRIEF

ON APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK



W. BERNARD RICHLAND
Corporation Counsel
Attorney for
Defendants-Appellants
Municipal Building
New York, N.Y. 10007
566-4337 or 4328

L. KEVIN SHERIDAN,
RENEE MODRY,
of Counsel.

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Questions Presented.....	2
Facts.....	2
The Decision Below.....	9
ARGUMENT	
PLAINTIFF'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE WITHDRAWAL OF HER CONDITIONAL TEACHING LICENSE FOR FAILURE TO SATISFY THE MINIMUM ELIGIBILITY REQUIREMENTS FOR THE LICENSE. THE CERTIFYING AUTHORITY IS NOT REQUIRED TO INVESTIGATE AND GIVE GREATER WEIGHT TO A PROFESSOR'S STATEMENT OF THE COURSE CONTENT THAN THE DESCRIPTION OF THE COURSE IN THE SCHOOL CATALOG. IT WAS, THEREFORE, IMPROPER TO CONDITIONALLY REINSTATE PLAINTIFF'S LICENSE AND TO GRANT HER ADDITIONAL TIME TO FULFILL MINIMUM REQUIREMENTS FOR THE LICENSE.....	10
Conclusion.....	13

TABLE OF AUTHORITIES

Cases:

<u>Berns v. Civil Service Comm'n City of New York</u> 537 F. 2d 714 (2d Cir., 1976).....	12
<u>Bishop v. Wood</u> , 426 U.S. 341 (1976).....	11
<u>Board of Regents v. Roth</u> , 408 U.S. 564 (1972).....	11
<u>Russell v. Hodges</u> , 470 F. 2d 212 (2d Cir., 1970)...	11

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CARMEN IRIZARRY,

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-against-

IRVING ANKER, individually and as
Chancellor of THE BOARD OF EDUCATION,
JULIUS R. RUBIN, Individually and as
Chairman of the BOARD OF EXAMINERS
and THE BOARD OF EDUCATION OF THE
CITY OF NEW YORK,

Defendants-Appellants
-----x

ON APPEAL FROM UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

Preliminary Statement

Defendants appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J), entered on November 10, 1976, reinstating plaintiff's teaching license on condition that by July 31, 1977 she complete at least two credits in instruction of methods and materials on a pre-kindergarten level in any institution of higher learning approved by the Board of Examiners.

Questions Presented

1. Were plaintiff's due process rights violated by the failure to give her a hearing prior to the termination of her conditional teaching license for failure to meet minimum eligibility requirements

where she had never been appointed pursuant to the license.

2. Does the District Court have jurisdiction to vary the minimum educational requirements for a teacher's license by extending the time to complete such requirements and by reinstating the license pending completion of the requirements?

Facts

Plaintiff commenced an action on or about October 27, 1976, pursuant to 42 U.S.C. §§1983, 1985 and 1986. Plaintiff claimed that revocation of her teacher's license, effective June 1976, for failure to meet minimum eligibility requirements by September 1, 1974 and termination of her employment as Instructor-Ethnic Studies without a hearing violated her procedural due process rights under the Fourteenth Amendment and were a result of her criticism of Board of Education policies in violation of her First Amendment rights* (3a-7a)**. Plaintiff also moved by order to show cause, returnable November 8, 1976, for preliminary injunctive relief (9a-10a).

On November 8, 1976 the Court converted the hearing on plaintiff's motion for preliminary relief to a trial on the merits (3).

Plaintiff testified that she received a B.A. degree in Child Psychology from Lehman College in June,

*Plaintiff's First Amendment claims were dismissed after trial and plaintiff is not appealing the dismissal.

**Numbers in parentheses refer to pages of joint appendix.

1973 and the following September she began teaching a bi-lingual fourth grade class at Public School 166 in Manhattan, pursuant to a Certificate of Competency (4). At the time she did not have a license to teach (id.). The Certificate of Competency was issued on a yearly basis commencing in September and terminating the following June (7-8). Thereafter, plaintiff was reappointed under Certificates of Competency issued in September 1974 and September 1975 (8, 11). Plaintiff testified that she was told by her principal that the Certificate was a temporary one issued on a yearly basis and would "only allow us to run from September to June" (26).

The Certificate of Competency covering plaintiff's employment for the school years 1973-1974, 1974-1975 and 1975-1976 described her position as an "Instructor of Hispanic Culture" (78) or "Ethnic Studies", or both (76). Each of the Certificates issued to plaintiff stated on its face that it was "issued subject to termination by the Chancellor at any time" (73-75, par. 1) and was contingent upon availability of funds for the program (id., par. 3). Each of the Certificates stated that it did not confer tenure and that employment under the Certificate was "temporary in nature" and terminated either at the end of the program or at the end of the fiscal year for which the Certificate was issued, whichever came first (id.). The Certificate

of Competency was not renewed for "this last year" [1976-1977] because the position under it was funded by a "Title 7 grant from HEW" and no funds were available (25).

Plaintiff testified that she took a "regular exam" in 1974 for "bilingual and early childhood"; "passed both" examinations and received a license for "bilingual education", but was not appointed under either license (5). She further testified that she was not familiar with the licensing requirements and prior to the exam did not know that there was a requirement with regard to certain courses in order to perfect her license (5-6).

The announcement for the examination taken by plaintiff and her application for the license was submitted in evidence by defendants (27). The announcement (76-81), dated December, 1973, listed the eligibility requirements and provided that by September 1, 1974 (with an exception not here relevant) applicants must at least have "[A] baccalaureate degree and 6 semester hours in the professional study of education, including at least 3 semester hours in instructional methods and materials on the pre-kindergarten and primary level" (76). The examination announcement also stated that:

"Applicants in this examination under existing law will not acquire tenure until all the eligibility requirements have been completed within the time limits set. Upon failure of an applicant to complete these

requirements within such period, his license will terminate" (78).

Mr. Braun, an Executive Assistant to the Board of Examiners (38), testified that the examination announcement is issued with the "application and general regulations" (38-39). The General Regulations Governing Examinations were introduced into evidence (39, 87-90). The section of the Regulations entitled "Meeting Eligibility Requirements" states that

"If a license is granted subject to the licensee's meeting eligibility requirements as of a later date specified in a By-law or a resolution of the Board of Education and the licensee fails by such date to meet the requirements, his license will lapse" (88, par. 14).

Plaintiff's application for the license, dated January 10, 1974 (82) and signed by plaintiff, stated that she had "read the official announcement of the examination for which I am filing this application" and "would now meet or shall meet the eligibility requirements by the date(s), stated in the examination announcement" (28, 85).

Plaintiff testified that after she received notice that she had passed the examination and that her license would be forwarded, she went back to Lehman College and spoke to a Counsellor there who looked at a transcript of her courses and told her "everything was in order" (6).

The license issued to plaintiff stated on its face that it was "subject to the By-Laws of the Board of

Education and subject to the conditions, if any, under which the issuance of this license was recommended and authorized" (86). Plaintiff was never appointed under the license (5, 26, 31-32).

Thereafter, the Board of Examiners reviewed the transcripts submitted by plaintiff, determined that she did not have the required courses delineated and underlined on the first page of the examination announcement and, accordingly, notified her on or about November 5, 1975 of her ineligibility for the license (12, 41, 62).

On or about March, 1976, Professor Peterson, an Assistant Professor in the Psychology Department at Lehman College and one of plaintiff's former professors wrote to the Board of Education at the request of plaintiff (13-14). Professor Peterson stated that his course, "Psychology of Exceptional Children," taught in the Psychology Department and taken by plaintiff in 1972, was taught "from the vantage point of the general needs" of students from the Department of Education, "i.e. theory, methodology, prescription and application in the classroom setting." Professor Peterson wrote that he placed "great emphasis on both understanding the child as well as remediation of the problem whether it be emotional, social or educational" (64). Professor Peterson did not testify at the trial. Plaintiff stated that he was very ill the last time she

spoke to him and she didn't know if he was still in New York (24).

On or about April, 1976, L. Rose, Senior Assistant to the Board of Examiners wrote to plaintiff, acknowledging receipt of Professor Peterson's letter and informing plaintiff of her right to appeal, noting that plaintiff's file showed that her license had been terminated in November, 1975, effective June 30, 1976, for failure to establish that she has taken 3 credits in methods and materials of teaching in the early childhood grades by September 1, 1974, one of the eligibility requirements for plaintiff's license (15, 65).

On or about May, 1976, plaintiff filed a formal appeal enclosing Professor Peterson's letter as "documentation" for her claim that she met all requirements for the license (15, 41, 66).

By letter dated June 23, 1976, the Board of Examiners wrote plaintiff that after careful consideration of the statement and evidence submitted on her appeal, the Committee on Appeals was convinced that the original judgment should not be set aside; accordingly her appeal was denied (16, 67).

Upon plaintiff's request, the Board of Examiners, by letter dated July 2, 1970, set forth in detail the reasons for the denial of plaintiff's appeal (16, 68-69). In substance, the letter informed plaintiff that she had failed to show that she had met minimum eligibility

requirements for her license by September 1, 1974 because she did not complete three credits in instructional methods on materials on the pre-kindergarten, kindergarten and primary levels as mandated by the Board of Education in its by laws and as announced in the examination announcement. The letter further noted that neither the Board of Education nor the Board of Examiners had the power to waive requirements or to grant time extensions. Criteria for acceptability of courses were the catalog descriptions and the course titles. Although there were representations that instructional methods were included in the course "Psychology of Exceptional Children," it was clear "that the major concentration was on the special psychological problems of exceptional children not on methods and materials on the pre-kindergarten, kindergarten and primary level" (71).

Mr. Yearwood, the Assistant Administrative Director to the Chairman of the Board of Examiners testified the criteria used to determine whether courses filled the requirements were the descriptions of the course in the school catalogs (44, 46) because professors' descriptions of what were taught were often "conflicting" (46). Mr. Yearwood further testified that the 1972-1973 course catalog for Lehman College listed a course entitled Methods and Materials in Early Childhood which would have qualified plaintiff for the missing requirements (46, 47,

91, 92). The course taken by plaintiff "Psychology of Exceptional Children" as listed in the course catalog" had nothing to do with method or methods of instruction" (48, 93).

The Decision Below (53-60

The Court found insufficient evidence that plaintiff was punished for her exercise of her free speech rights and "a complete failure of proof" to show that funds were available for plaintiff's appointment under a Certificate of Competency and dismissed her cause of action based upon violation of her rights of free speech (53-54).

The Court also found that the bi-lingual early childhood teaching license issued to plaintiff was "clearly issued subject to the plaintiff's having at least three semester hours in instructional methods on the pre-kindergarten and primary level" (54).

Although the Court found that plaintiff applied for and was granted a hearing, it held the hearing insufficient because the Board of Examiners had failed to consider the actual course content, but had relied solely on the course description. "This was "no criticism of its method in the finding" (55). Moreover, the Court declined to order a new hearing in view of the illness of the instructor and the practice of the Board of Examiners.

Instead, "in the exercise of its equitable powers," the Court ordered plaintiff's teaching license reinstated

"in conditional form" subject to plaintiff's completion of two credits in a course and school approved by the Board of Examiners (57-58). In so deciding, the Court stated that its decision was "not a precedent for other cases" and "doesn't affect your general procedures whatsoever".

ARGUMENT

PLAINTIFF'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE WITHDRAWAL OF HER CONDITIONAL TEACHING LICENSE FOR FAILURE TO SATISFY THE MINIMUM ELIGIBILITY REQUIREMENTS FOR THE LICENSE. THE CERTIFYING AUTHORITY IS NOT REQUIRED TO INVESTIGATE AND GIVE GREATER WEIGHT TO A PROFESSOR'S STATEMENT OF THE COURSE CONTENT THAN THE DESCRIPTION OF THE COURSE IN THE SCHOOL CATALOG. IT WAS, THEREFORE, IMPROPER TO CONDITIONALLY REINSTATE PLAINTIFF'S LICENSE AND TO GRANT HER ADDITIONAL TIME TO FULFILL MINIMUM REQUIREMENTS FOR THE LICENSE.

The evidence below clearly establishes that plaintiff was never appointed to a teaching position under her conditional license (5) and that her employment under the Certificate of competency was on a yearly basis, was subject to the availability of funds and conferred no tenure rights (73-75). Moreover, the Court below found a "complete failure of proof" that funds, were available for plaintiff to continue teaching under the Certificate of Competency.

It was also clearly established, and the Court so found, that plaintiff's license was conditional upon her completion of a certain course in instructional

methods (54, 76, 78, 86). It was equally clear that the course had to be completed by September 1, 1974 and that completion of such course by the required date was a minimum requirement (76, 78).

Under §2573 of the State Education Law,

"persons with licenses obtained as a result of examinations annouced subsequent to the twenty-second day of May, nineteen hundred sixty-nine appointed upon conditions that all announced requirements for the position be fulfilled within a specified period of time, shall not acquire tenure unless and until such requirements have been completed within the time specified for the fulfillment of such requirements, notwithstanding the expiration of any probationary period."

Board of Education Regulations submitted in evidence (87-88) also make clear that a license will "lapse" if eligibility requirements are not met by the required date (Reg. 14). Under such circumstances, plaintiff did not have a property right in the license and accordingly did not have a constitutional right to a hearing prior to the termination of her license. Her "unilateral expectation of employment" or the continuation of her license does not confer a property right. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Russell v. Hodges, 470 F. 2d 212, 216-217 (2d Cir., 1972). Cf. Bishop v. Wood, 426 U.S. 341 (1976).

In any event, the District Court found that plaintiff was given a hearing (55) but the Board of

Examiners failed to consider the actual course content of the course submitted by plaintiff, as described by her former professor, which description was not in accord with the description in the course catalog. The sole question then presented by this appeal is whether any of plaintiff's federal rights were infringed by the failure of the certifying body to give greater weight to a professor's statement of course content than the description of the course in the school catalog. We think not, and the Court below seemed to agree when it found no criticism of the Board's procedures (55) (and hence no constitutional violation). Although conditionally reinstating plaintiff's license, the judgment required plaintiff to complete a course approved by the Board of Examiners but at a later date than that mandated by Board of Education requirements. Under such circumstances, we submit, the Court below improperly extended her time to comply with minimum requirements.

A federal Court "must decline to instruct state agencies as to what constitutes compliance with their own regulations." Barns v. Civil Service Comm'n City of New York, 537 F. 2d 714, 717(2d Cir. 1976). Since it was clear that plaintiff had failed to comply with requirements under state law, her complaint should have been dismissed. Whether the Board of Examiners was correct in rejecting plaintiff's claim is clearly

not a constitutional issue. Bishop v. Wood, supra, 90
S. Ct. at 2080.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE
REVERSED AND THE COMPLAINT DISMISSED.

March 21, 1977.

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel of
the City of New York
Attorney for Appellants

L. KEVIN SHERIDAN,
RENEE MODRY,

of Counsel.

STATE OF NEW YORK :
COUNTY OF NEW YORK : SS.:

JAMES BEANS

being duly sworn, says that on the 21st day of MARCH 1977
at No. 275 MADISON AVE in the Borough of MANHATTAN in NEW YORK CITY, he
served a copy of the annexed BRIEF upon JOAN GOLDBERG Esq.
the Attorney for the PLIFF in the within entitled action,
by delivering a copy of the same to a person in charge of said Attorney's office,
and leaving the same with him.

Sworn to before me, this 21st:

day of MARCH 1977
Bruce S. Garner
Commissioner of Deeds
City of New York - No. 4-1788
Commission Expires May 1, 1978